Supreme Court, U.S.
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No. 03-1386

IN THE

Supreme Court of the United States

GRANITE STATE OUTDOOR ADVERTISING, INC.,

Petitioner,

v.

CITY OF ST. PETERSBURG, FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The Respondent objects to the Petitioner's statement of the Questions Presented as being a misstatement of the holding of the Eleventh Circuit Court of Appeals, and suggests that the Questions Presented are more fairly restated as follows:

> Did the Eleventh Circuit, after deciding that the City's sign ordinance is a content-neutral regulation of sign structures and that the ordinance contains adequate safeguards to guide official decisionmaking, correctly hold that express time limits for the processing of permit applications are not required?

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STATEMENT OF THE CASE

A. Facts

An ordinance of the City of St. Petersburg, Florida (the "City") regulates the size, location, and number of sign structures within the city limits. The ordinance was enacted to promote uniformity, preserve aesthetics, and foster safety. App. to Petition, 6a.

Both the district court and the Eleventh Circuit found that the ordinance contains criteria to be used by the City in deciding whether to issue a permit for an off-premise sign structure. The criteria include the height and area of the structure, separation distances between structures, and setback requirements. The criteria also include the zoning of the lot, whether there are other structures on the lot, and whether there is already an off-premise sign on the lot. App. to Petition, 2a-3a. Both courts found that the criteria are specific, objective and narrowly tailored, and that an application may be denied only upon the basis of the specified size, location, and number criteria. App. to Petition, 7a & n.4; 40a, 49a. A sign's message is not one of the criteria.

This controversy began when Granite State Outdoor Advertising ("Granite") filed six applications for permits to erect billboards within the City. Granite complains that the sign ordinance does not require the City to make a decision on an application to post a sign. Petition, 3. However, the City denied all of the sign permit applications seventeen days after they were filed. The applications were denied because other structures already existed on the lots, and because Granite failed to demonstrate compliance with the height, separation, and distance requirements. One application was

for a lot zoned residential multifamily. Another failed to demonstrate it met the minimum footage requirement. App. to Petition, 3a.

Without attempting to seek administrative review of the denials, Granite filed suit claiming that the sign ordinance was unconstitutional on its face and as applied. App. to Petition, 3a, 19a.

Granite refers to the sign ordinance as a "speech permitting scheme" and asserts that "no speech can go forward absent permission." Petition, 5, 8. These are misleading representations. As the district court found, the ordinance on its face is a content-neutral regulation of sign structures, not an impermissible restriction of speech based on content. The uncontroverted evidence of the City's sign examiner is that she never makes a decision on the basis of the viewpoint of the message. Granite's applications were denied for reasons unrelated to the message. App. to Petition, 38a-40a. For those reasons, the Eleventh Circuit agreed that the ordinance is content neutral. App. to Petition, 6a-7a.

Remarkably, none of the decisions alleged to be in conflict with the decision below relate to sign structures or the enforcement of sign ordinances, with the exception of a decision of the Eleventh Circuit Court of Appeals brought by the same plaintiff against the City of Clearwater, Florida. In that case, as in the case below, Granite was unsuccessful.

B. Procedural History

Granite's statement of the proceedings below (Petition, 3) is both argumentative and incorrect. The City adopts the summary of the procedural history of this case as set forth by the Eleventh Circuit Court of Appeals. App. to Petition, 3a.

Granite states that the Eleventh Circuit held that "the fact that there were *no procedural safeguards* constraining the processing of sign applications by City officials was not a defect in the ordinance." Petition, 4 (italics added). This is not merely incorrect; it is the cracked foundation from which the entirety of Granite's argument falls.

REASONS FOR DENYING THE PETITION

The decision below does not conflict with a relevant decision of this Court or any decision of any Court of Appeals, and does not depart from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's supervisory power. Supreme Court Rule 10.

The decision does not conflict with decisions of this Court.

The decision of the Eleventh Circuit is limited to the threshold issues of whether the City's sign ordinance regulates structures, not speech, in a content-neutral manner, and whether the ordinance contains adequate standards to guide official decisionmaking. After deciding the threshold issues in the affirmative, the principal issue became whether express time limits for the processing of permit applications are required. The court answered this question in the negative.

Granite appears to focus its attention only upon the principal issue. Granite misstates the decision below in two respects. Granite asserts that the ordinance regulates "speech" or "speech activities," contrary to the decision of the court. Granite also asserts that the Eleventh Circuit has approved an ordinance which does not include any procedural

safeguards whatsoever. Granite does not attempt to explain why the court was wrong in deciding that the ordinance regulates sign structures or in deciding that the ordinance contains adequate safeguards to guide decisionmaking. Accordingly, the issue for consideration here is limited to whether the Eleventh Circuit's decision that the ordinance need not contain express time limits for the processing of permit applications is in conflict with decisions of this Court or other Courts of Appeal.

The three decisions of this Court alleged by Granite to be in conflict with the decision below are distinguishable on the basis of their facts and the First Amendment analysis appropriate to each case.

The historic background for these three decisions is *Freedman v. Maryland*, 380 U.S. 51 (1965), where motion pictures were subject to prior approval by a state board of censors having the power to prohibit the showing of films judged by the board to be obscene or tending to debase or corrupt morals or incite to crimes. In striking down the statute, this Court imposed three procedural requirements upon a censorship scheme: (1) Any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained; (2) a prompt final judicial review of that decision must be assured; and (3) the censor must bear the burden of going to court to suppress the speech and bear the burden of proof once in court. *Freedman*, 380 U.S. at 58-59.

The decision below and the allegedly conflicting post-*Freedman* cases arose from substantially different factual situations but have a common theme. In each case, the outcome depends upon whether and to what extent the

government is attempting to abridge the freedom of speech contrary to the First Amendment and, if so, whether the procedural requirements of *Freedman* are required or, as a minimum, whether other safeguards are required to limit the exercise of discretion by government officials.

In *Riley v. National Federation of the Blind of North Carolina*, 487 U.S. 781 (1988), this Court declared invalid a statute licensing professional solicitors of charitable contributions. The statute had three deficiencies, of which only one is relevant to this case. The statute effectively required a "license to speak." The licensing requirement was an improper prior restraint upon speech because, contrary to *Freedman*, *supra*, the statute failed to require the licensor to issue a license or go to court within a specified brief period, and improperly permitted a delay without limit.

In *FW/PBS v. City of Dallas*, 493 U.S. 215 (1990), this Court examined an ordinance regulating sexually oriented businesses. The ordinance targeted businesses purveying sexually explicit speech having First Amendment protection, and was more onerous with respect to sexually oriented businesses. The ordinance did not set a time limit within which the licensing authority must act, and did not provide for prompt judicial review. The ordinance vested unbridled discretion in the chief of police. This Court concluded that the licensing scheme was a prior restraint that lacked adequate procedural safeguards. *Id.* at 223. Although the ordinance did not present the "grave dangers of a censorship system," *id.* at 228, the ordinance failed to provide the first two of the safeguards of *Freedman*, *supra*, and was therefore invalid.

In *Thomas v. Chicago Park District*, 534 U.S. 316 (2002), this Court considered the validity of an ordinance requiring permits prior to conducting any large-scale event in a public park. The challenge was brought by persons wishing to hold rallies advocating the legalization of marijuana. This Court found that the ordinance regulated the time, place, and manner of the use of a public forum in a content-neutral manner, and in a unanimous decision held that the procedural requirements of *Freedman* did not apply. A content-neutral ordinance regulating speech in a public forum, limited by its terms to considerations of public safety and the like, differs totally and utterly from an ordinance which gives an official the authority to censor the content of a speech. *Id.* at 322-23. This Court expressly distinguished the case from *FW/PBS*, *supra*. *Id.* at 323, n.2. This Court did not merely exempt the Chicago Park District ordinance from the third of the *Freedman* requirements nor did this Court require compliance with a time schedule for decisions to be made on applications for permits, as Granite argues. Petition, 6-7. A mandatory time limit is one of the *Freedman* requirements. This Court, without dissent, held that the procedural requirements of *Freedman* did not apply. *Thomas*, 534 U.S. at 322-23, 325.

But that was not the end of the matter:

> Of course, even content-neutral time, place, and manner restrictions can be applied in such a manner as to stifle free expression. Where the licensing official enjoys unduly broad discretion in determining whether to grant or deny a permit, there is a risk that he will favor or disfavor speech based on its content. [Citation omitted.] We have thus required that a time, place, and manner

> regulation contain *adequate safeguards to guide the official's decision* and render it subject to effective judicial review [Citation omitted.] . . . (Italics added.)

Thomas, 534 U.S. at 323. The park district's ordinance passed that test because a permit could be denied only for one or more of the reasons specified in the ordinance, and the grounds were reasonably specific and objective. *Id.* at 324.

A clear pattern emerges from this trilogy of cases. If a licensing scheme regulates protected expression based on content, or operates as a prior restraint on protected expression, then the first two if not all three of the *Freedman* requirements apply; *FW/PBS* and *Riley*, *supra*. If a licensing scheme is a content-neutral time, place, and manner regulation of expression and does not operate as a prior restraint on protected expression, the procedural requirements of *Freedman* do not apply; *Thomas*, *supra*. In all cases where the government regulates protected expression, there must be safeguards adequate to protect against the exercise of unbridled discretion on the part of the official having authority to issue licenses.

The decision below is not in conflict with *Thomas*, *FW/PBS*, or *Riley*. First and foremost, unlike the case below, these decisions do not relate to sign structures or the enforcement of sign ordinances. They relate to regulating expression in the context of regulating the use of a public park, as in *Thomas*; sexually oriented businesses, as in *FW/PBS*; or charitable solicitations, as in *Riley*. In the case below, the City's sign ordinance regulates the size, location, and number of sign structures in a content-neutral manner without restricting expression on the basis of content.

The difference between sign structures and expressions that may appear on sign structures is not a matter of semantics. By analogy, a local government has a legitimate public interest in assuring that a new building meets applicable zoning, building, and life safety code requirements, which ordinarily generate no First Amendment issues. If the building someday houses a sexually oriented business, the government might have an entirely different sort of interest reflected in a different sort of ordinance. Regulating protected expressive activities within the building would be subject to higher standards, and four of the cases cited by Granite are examples of such cases. But, the patrons and employees of the business should enjoy the reasonable expectation that the building was constructed according to code.

For the sake of argument, if the City's sign ordinance regulates speech (a proposal with which the City does not agree), the first issue is whether the ordinance is content-neutral or operates as a prior restraint on protected expression. The sign ordinance regulates the size, location, and number of sign structures and is not a content-based restraint on speech. There is virtually no risk that the City's sign permit official will favor or disfavor speech based on its content when examining plans for a sign structure. Accordingly, the procedural requirements of *Freedman* do not apply. *Thomas*, *supra*.

Thomas and the decision below are not in conflict. In both cases, the ordinance requires content-neutral licensing which is not subject-matter censorship. In both cases, the ordinance contains specific criteria for making decisions upon applications, and a denial must be based upon one or more of the criteria. In both cases, none of the grounds for denying a permit has anything to do with what a speaker might say or what a sign placed upon a billboard structure might say.

FW/PBS and the decision below are not in conflict. The Dallas ordinance operated as a prior restraint on protected expression because it targeted businesses purveying sexually explicit speech. Accordingly, this Court declared the ordinance invalid for failing to provide the first two of the procedural safeguards of *Freedman*. In the case below, the City's ordinance is content neutral and does not operate as a prior restraint on protected expression. The ordinance regulates sign structures and furthers legitimate objectives unrelated to expressions or viewpoints that may appear on such sign structures.

Riley and the decision below are not in conflict. The deficiencies of the charitable solicitation statute are not shared by the City's sign ordinance. The charitable solicitations statute was found to be a prior restraint on speech, subject to the procedural requirements of *Freedman*. The City's sign ordinance regulates sign structures, not sign messages, and is not a content-based prior restraint on speech. Accordingly, as in *Thomas*, the procedural requirements of *Freedman* are not applicable.

The decision does not conflict with a decision of any Court of Appeals.

The decisions from other circuits allegedly in conflict adhere to the same pattern discussed above with some variations. The variations derive from the unique facts of each case. The decisions are not in conflict.

Granite alleges broadly that the decisions are in conflict with the decision below, but the gist of the argument is that the other courts have "made the same mistake as the *Granite* panel . . . by misreading *Thomas* to remove all safeguards

from content-neutral speech restrictions" or "to have done away with safeguard requirements for content-neutral speech permitting scheme." Petition, 12-13. No court has removed "all" safeguards. Granite does not explain how the decisions are in conflict if all of the courts have made the same "mistake."

In *Southworth v. Board of Regents of the University of Wisconsin System*, 307 F.3d 566 (7th Cir. 2002), students unsuccessfully challenged a mandatory student activity fee as being not content-neutral and subject to unbridled discretion in the allocation of funds among student organizations.

Earlier, this Court acknowledged that college students cannot be required to pay subsidies for "extracurricular student speech" of other students unless the program is "viewpoint neutral." *Board of Regents of the University of Wisconsin System v. Southworth*, 529 U.S. 217, 221 (2000). In reaching its decision, this Court did not discuss *Freedman*.

Following remand, the district court determined that the decision-maker had been granted too much discretion. Subsequently, the Seventh Circuit found that the university fee system set forth specific, detailed, narrowly drawn and reasonable standards guiding the discretionary decisions to allocate the funds, and upheld the system with one limited exception not relevant here.

In *Southworth*, as in the case below, the courts required adequate safeguards to protect against the exercise of unbridled discretion.

The decision below does not conflict with *Encore Videos v. San Antonio*, 330 F.3d 288 (5th Cir. 2003), *cert. denied*, 124 S. Ct. 466 (2003), and the Fifth Circuit certainly did not remove all safeguards. In that case, a San Antonio ordinance prohibited the location of sexually oriented businesses within 1,000 feet of residential areas. The ordinance was invalid as applied to businesses selling adult materials only for home viewing, but was otherwise valid. As a licensing ordinance regulating protected expression, the court determined that the ordinance possessed the two "essential" safeguards required by *FW/PBS*. The ordinance passed both of those tests because a license could be denied only on the basis of distance, a decision on a license application was required within 30 days, and the ordinance provided for prompt access to judicial review.

The Fifth Circuit found a clear distinction between adult business licensing ordinances and a permit system regulating the use of public parks. Because of the differences in subject matter, the relevance of *FW/PBS* was deemed unaffected by *Thomas*. *Encore Videos*, 330 F.3d at 296, n.12.

Likewise, *Encore Videos* is distinguishable from the case below. The City's sign ordinance is not a licensing scheme regulating adult businesses or having the effect of operating as a prior restraint on protected speech, but instead regulates the size, location, and number of sign structures in a content-neutral manner, and the procedural requirements of *Freedman* and *FW/PBS* do not apply.

The decision below does not conflict with *Z. J. Gifts D-4 v. City of Littleton*, 311 F.3d 1220 (10th Cir. 2002), *cert. granted*, No. 02-1609, 124 S. Ct. 383 (Oct. 14, 2003). In that case, as in other cases arising from ordinances

governing the licensing of sexually oriented businesses, portions of the ordinance were declared invalid because the ordinance did not include the safeguards of specifying a time limit within which the city must act or guaranteeing a prompt judicial decision on the merits when an adult business challenges a license denial.

Littleton is not in conflict with the decision below, and the court did not remove all safeguards for "speech permitting schemes." Ordinances regulating adult business establishments are treated as prior restraints on businesses that sell materials presumptively protected by the First Amendment. Such ordinances are distinguishable from ordinances which regulate the size, location, and number of sign structures in a content-neutral manner without restricting speech.

There is no conflict between the decision below and *Fly Fish v. City of Cocoa Beach*, 337 F.3d 1301 (11th Cir. 2003), where the ordinance prohibited totally nude dancing in adult entertainment establishments. On the relevant issue of the validity of the licensing process, the ordinance required an adult entertainment license to be issued within 30 days if the city did not act on the application. If the city did not formally deny an application within 30 days, the ordinance permitted an adult entertainment establishment to remain open on a "temporary" license, conditioned on the ultimate licensing decision of the city. The court found that the failure of the city to act upon an application within a prescribed time period operated as an improper prior restraint upon protected expression. *Thomas* did not alter the procedural requirements applicable to licensing provisions targeting adult entertainment establishments. *Fly Fish*, 337 F.3d. at 1313, n.25.

Fly Fish is easily distinguishable from the case below, and the court cannot be accused of having removed all of the safeguard requirements for "speech permitting schemes."

Granite mistakenly argues that the Courts of Appeals for the Federal Circuit and the First and Eleventh Circuits have read *Thomas* as having "done away" with safeguard requirements for content-neutral speech permitting schemes, citing *Griffin v. Secretary of Veterans Affairs*, 288 F.3d 1309 (Fed. Cir. 2002), *New England Regional Council of Carpenters v. Kinton*, 284 F.3d 9 (1st Cir. 2002), and *Granite State Outdoor Advertising v. City of Clearwater*, 351 F.3d 1112 (11th Cir. 2003). Petition, at 13.

In *Griffin*, *supra*, the petitioner unsuccessfully sought to display the Confederate flag at a national cemetery where Confederate soldiers are buried. The court ruled that decisions by the Department of Veterans Affairs to permit or deny exceptions to its ban on unauthorized demonstrations are not subject to the procedural safeguards requirements applicable to explicit censorship schemes restricting expression in public fora. National cemeteries are not public fora, and they serve particular commemorative and expressive roles. Where the government uses a nonpublic forum for its own expressive purposes, the government has greater discretion to decide what speech is permissible than in other fora serving no such purposes. *Griffin*, 288 F.3d at 1324.

Griffin is plainly distinguishable from all other cases cited by Granite in all respects. The court did not "[do] away" with safeguard requirements for "speech permitting schemes;" the court instead applied standards applicable to government-owned nonpublic fora which serve unique commemorative roles.

In *New England Regional Council of Carpenters, supra*, the issues were whether a state agency may ban leafletting on Boston's Fish Pier, a multipurpose pier that the agency controls, and whether the agency may require a person seeking to distribute handbills on public sidewalks controlled by the agency to apply in advance for a permit. The pier is a non-public forum and the leafletting ban was a valid exercise of governmental authority; the sidewalk is a traditional public forum but the permit requirement was valid on its face. *Id.* at 14, 25.

Examining the permit requirement in light of *Thomas, supra*, the court questioned whether the regulations (1) possessed adequate standards to guide the exercise of official discretion and (2) were narrowly tailored to a significant state interest while leaving open satisfactory alternative means of communication. *New England Regional Council*, 284 F.3d at 25. The court upheld the regulations as valid content-neutral time, place, and manner restrictions.

In *Granite v. City of Clearwater, supra*, an action challenging the City of Clearwater's sign ordinance, the Eleventh Circuit decided that Granite had standing to challenge only that part of Clearwater's ordinance limiting the area and height of a freestanding sign, but did not have standing to challenge the provisions establishing the city's permitting and appeals processes. Regarding the area and height limitations, Clearwater's ordinance did not vest the decision-maker with unbridled discretion. Regarding the absence of time limits, the court stated that time limits are required when their lack could result in censorship of certain viewpoints or ideas but are not categorically required when the permitting scheme is content-neutral; *Clearwater*, 351 F.3d. at 118. Granite did not show how it was harmed by

an absence of time limits in the permitting process; in fact, the permits were denied the same day they were received.

In none of these cases have the courts "done away with" adequate safeguards when the government seeks to license or regulate protected expression. None of the decisions examine ordinances regulating sign structures without regard to message content with the exception of *Clearwater*, *supra*. In the *Clearwater* decision, the court correctly observed that Granite had no standing to challenge the city's permitting and appeals processes. In neither *Clearwater* nor the case below could Granite show how it was harmed by an absence of time limits in the permitting process, or how a lack of time limits could result in censorship of viewpoints or ideas.

Granite cites decisions by district courts which are "divided on the issue." Petition, 14. n.2. The first of the cited decisions, *Diener v. Reed*, 232 F. Supp.2d 362 (M.D. Penn. 2002), was a disorderly conduct case. That decision has been affirmed on appeal in an unpublished opinion; *Diener v. Reed*, No. 03-1405, 77 Fed. Appx. 601, 2003 U.S. App. LEXIS 20811 (3d Cir. September 19, 2003). Such decisions are outside the proper scope of the Petition.

CONCLUSION

For the foregoing reasons, Respondent, City of St. Petersburg, Florida, asks that this Court deny the petition for writ of certiorari.

Respectfully submitted,

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CITY OF ST. PETERSBURG, FLORIDA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF

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REPLY TO BRIEF IN OPPOSITION

To its credit, Respondent City of St. Petersburg has not shied from the issue at hand. The parties agree that the question posed by the decision in *Granite State Outdoor Advertising, Inc. v. City of St. Petersburg* is whether or not the Court's unanimous decision in *Thomas v. Chicago Park District* exempted content-neutral time, place, and manner restrictions on speech from compliance with any of the procedural safeguards mandated in *Freedman v. Maryland.* Petitioner Granite State has argued that the holding of *Thomas* was limited to ordinances regulating the use of public facilities and that the Court clearly did not intend to overturn the holding of decisions such as *Riley v. National Federation of the Blind* that even restrictions that can be labeled content-neutral time, place, and manner restrictions must include time limits on the permitting process. The City argues that *Thomas* freed governments from adhering to procedural safeguards for all content-neutral speech regulations and, therefore, overturned *Riley* and other decisions. The Eleventh Circuit Court of Appeals has adopted and reaffirmed this position and so have at least two other circuit courts. Granite State has shown in its initial Brief and herein that this interpretation is not tenable in light of the jurisprudence of procedural safeguards that has developed since 1965. Granite State's Petition should be granted to prevent a gross and unwarranted increase in the government's power to control speech.

I. The Risk of Abuse of Power by Governmental Officials that Necessitates Procedural Safeguards Is Present Even In Content-Neutral Regulations.

Procedural safeguards have been constitutionally mandated first and foremost because government officials should not be afforded the authority to improperly delay speech activity. *Freedman v. Maryland*, 380 U.S. 51, 58-59 (1965). Because many commercial and noncommercial messages are only relevant for a short period of time, such as during a sale or an election cycle, delay of speech activity is often tantamount to denial of the speech altogether. *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 802 (1988) (acknowledging that "delay compels the speaker's silence"). "Loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). The power to delay speech must be sharply limited. As such, prior restraints of speech activity, when allowed at all, should only be allowed for a short and definite period of time. *E.g.*, *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 228 (1990).

In the realm of sign regulations, the risk of delay is readily apparent. For example, a city sign ordinance could require, as most do, that a permit be obtained before a sign is posted. Even if the ordinance allows no consideration of the content of the proposed sign, if city officials are allowed to hold applications for weeks, months, or indefinitely, they are afforded an improper degree of control over speech. Decision-making in regard to applications will undoubtedly be impacted by

the character of the applicant. Although the Chamber of Commerce's application for a 32 square foot temporary sign is approved immediately, a substantively-identical application submitted by a youth wearing a pro-marijuana tee-shirt might be delayed for several weeks. Although Wal-Mart's sign application is handled promptly, the adult bookstore's application may languish for months. Without a definite time limit on permitting, city officials have unlimited power to restrain speech on signs for any reason they choose. As this Court has previously recognized, the constitutional basis for requiring procedural safeguards is not dependent on the content-based nature of the regulation.

Even ordinances with definite time limits can be unconstitutional. For example, if a city imposed a review process whereby all sign applications are considered by various city departments over a six-month period and then granted or denied, the process would be unconstitutional. Whether or not content was a consideration for the officials is irrelevant because speech is restrained for a period of time that cannot be deemed "brief." *FW/PBS*, 493 U.S. at 228 (recognizing that "any restraint prior to judicial review can be imposed only for a specified brief period"). Thus, ordinances can be wholly content-neutral but still afford government officials too much discretion to delay speech activity. *E.g., Forsyth County v. Nationalist Movement*, 505 U.S. 123, 133, n. 10 (1992) (reiterating that whether a content-neutral "ordinance delegates overly broad discretion to the decisionmaker [depends] not on whether the administrator has exercised his discretion in a content-based manner, but whether there is anything in the ordinance preventing him from

doing so"). Without requiring brief, specified time limits to constrain government officials' deliberations, nothing prevents them from arbitrarily delaying or suppressing a permit applicant's speech rights.

II. Whether "Signs" or "Sign Structures" are Regulated by the Sign Ordinance Makes No Difference to the Constitutional Analysis.

The City attempts to argue that because its Sign Ordinance "regulates structures, not speech" there is no need for procedural safeguards. Brief in Opposition, p. 3.[1] As this Court has often acknowledged, however, control of the medium of speech is control of the speech itself. For example, the regulation of newsracks, cable television wires, and adult entertainment establishments is subject to constitutional protections. *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 415 (1993) (newsracks entitled to First Amendment protection as the "manner" in which speech is distributed); *Turner Broadcasting Sys., Inc. v. FCC*, 520 U.S. 180, 214 (1997) (recognizing regulations on cable television subject to First Amendment protections); *FW/PBS*, 493 U.S. 215, 224 (1990) (acknowledging that adult bookstores, adult theaters, and adult cabarets entitled to First Amendment protections). Signs are, of course, an even more

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[1] A brief evaluation of the Sign Ordinance shows that it most definitely did regulate speech by including dozens of categories of signs that were distinguishable based only upon the content of the message conveyed thereon. (2a, 16a). Nevertheless, if a regulation prevents posting a sign without a permit – even if it regulates only physical characteristics of signs – it must include temporal limitations on the permitting process.

fundamental medium of speech. *City of Ladue v. Gilleo*, 512 U.S. 43, 54-55 (1994). The City requires a permit before a sign can be posted in the ground, on a building, or in a window. The only type of sign exempt from regulation with the exception of several content-based categories, (16a), would arguably be signs held aloft by a person without any need for a "sign structure." The Court has recognized that such ineffective means of communication are not legitimate alternatives to the use of traditional signs. *Ladue*, 512 U.S. at 57-58.

The City has conceded that it "regulates the size, location, and number" of signs. *Id.* at 7, 8. The City harps on the distinction between regulating signs and sign structures without describing how this distinction makes any difference from a constitutional perspective. Any person or entity seeking to post a sign in the City, must first obtain permission from City officials. The City acknowledges the risk that its officials could "favor or disfavor speech" but argues that such a risk is slight. *Id.* at 8. Even a slight risk is unacceptable, however, when it can be so easily prevented by adherence to this Court's directives that have been in place since the *Freedman* decision was issued in 1965. Sign applicants simply should not be subject to potentially endless delays.

CONCLUSION

City officials in St. Petersburg, Florida must give their stamp of approval before the vast bulk of signs can be posted. This restraint is imposed on individuals and organizations seeking to post signs on their own property as well as those endeavoring to

place a sign on publicly-owned land. This restraint applies to signs conveying either commercial or noncommercial messages. It is undisputed that City officials can take as long as they like to decide whether to grant or deny sign applications. (3a). The City and two circuit courts of appeal have concluded that the decision in *Thomas v. Chicago Park District* has freed government officials from time constraints on speech permitting whenever it can be argued that the restriction is content-neutral. The decision in *Granite State v. St. Petersburg* threatens to thoroughly undermine the purpose of procedural safeguards. Speech can and will be delayed with impunity by government officials. The holding in *St. Petersburg* would, of course, apply with equal force to the permitting of many other speech activities, such as parades, festivals, soliciting, leafleting, newspaper distribution, adult entertainment, and any other activity that is arguably regulated in a content-neutral fashion. Granite State's Petition should be granted to prevent further damage to free speech activities that will unquestionably result from the Eleventh Circuit's *Granite State v. St. Petersburg* decision.

Respectfully submitted,

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